

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ARDOTH E. HILTON
Claimant

VS.

THE BOEING CO.- WICHITA
Respondent

AND

AETNA CASUALTY & SURETY
Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

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Docket No. 183,050

ORDER

The respondent and its insurance carrier requested review of the Award dated January 19, 1995, and the Award Nunc Pro Tunc dated January 20, 1995, both entered by Administrative Law Judge Shannon S. Krysl.

APPEARANCES

Claimant appeared by her attorney, Kelly W. Johnston of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, Eric K. Kuhn of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Randall C. Henry of Hutchinson, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, the respondent, insurance carrier, and Workers Compensation Fund stipulated that the Workers Compensation Fund shall be liable for 50 percent of all temporary total disability, permanent partial disability, medical benefits, vocational rehabilitation expenses, litigation costs, and all other amounts awarded to claimant in this proceeding.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for a stipulated 13 percent whole body functional impairment for the period from the date of accident on January 28, 1992, through September 12, 1994. For the period after September 12, 1994, the Administrative Law Judge awarded claimant permanent partial disability benefits for a 50 percent work disability. The respondent and its insurance carrier requested this review and asked the Appeals Board to review the issue of nature and extent of disability. That is the only issue now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award and Award Nunc Pro Tunc entered by the Administrative Law Judge should be affirmed.

While working for the respondent, claimant developed bilateral carpal tunnel syndrome. The parties stipulated that claimant sustained a work-related injury on January 28, 1992. Respondent referred claimant to board-certified orthopedic surgeon Paul Lesko, M.D., who performed surgery on both wrists. The parties stipulated claimant has a 13 percent whole body functional impairment as a result of the upper extremity injuries.

In June 1992, Dr. Lesko released claimant to return to work with restrictions. Respondent provided claimant with accommodated employment and placed claimant in work pool where she primarily dusted, emptied trash, cleaned restrooms, and inspected parts.

On September 15, 1992, claimant injured her left ankle. Claimant sought treatment from J. Stanley Jones, M.D., who took claimant off work for approximately one month in November 1992. Claimant returned to work for respondent and worked for a few more months until Dr. Jones took her off work again in February 1993. While off work pursuant to Dr. Jones' instructions, respondent sent claimant a 60-day notice of possible layoff in April 1993, a second notice in June 1993, and two more notices in July 1993. The final notice advised claimant that her layoff was projected to occur between September 28, 1993 and October 12, 1993. Then in September 1993, respondent sent claimant a letter notifying her to remove her toolbox within 90 days or it would be disposed of. Because claimant was off work for medical reasons, respondent was not required to send claimant a 14-day notice of actual layoff.

At regular hearing in September 1994, claimant testified that she has not returned to work since Dr. Jones took her off work on February 13, 1993. Claimant also testified she believes respondent has laid her off and that respondent has discontinued her fringe benefits.

Based upon the above facts, the Administrative Law Judge held that claimant was entitled to receive permanent partial general disability benefits based upon functional impairment from the date of accident through September 12, 1994, when she was told to pick up her toolbox. For the period after September 12, 1994, the Administrative Law Judge held that claimant was entitled to a 50 percent work disability which was derived by averaging a 59 percent loss of ability to perform work in the open labor market with a 41 percent loss of ability to earn a comparable wage. The Administrative Law Judge averaged the

percentages provided by vocational rehabilitation experts James Molski and Karen Terrill to determine those percentages of loss.

In a supplemental brief, claimant requests the Appeals Board to affirm the Award in all respects and cites Lee v. Boeing Co., 21 Kan. App. 2d 365, 899 P.2d 516 (1995). Respondent requests the Appeals Board to deny work disability because it contends claimant failed to prove she is no longer employed by respondent despite her receiving the layoff notices. Respondent further contends that claimant should be required to initiate a review and modification proceeding if, in fact, claimant has been laid off. Respondent also contends that claimant should be limited to benefits based upon functional impairment because claimant was able to perform the accommodated work provided by respondent until she sustained her left ankle injury in September 1992. Therefore, respondent argues any work disability should be associated with the ankle injury rather than this proceeding. Claimant counters by arguing that she was terminated due to no fault of her own and, therefore, has overcome the presumption of no work disability contained in K.S.A. 1991 Supp. 44-510e.

Because hers is an unscheduled injury, K.S.A. 1991 Supp. 44-510e governs the computation of permanent partial general disability benefits. That statute provides in part:

“The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee’s education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.”

Based upon the evidence presented, the Appeals Board finds that the presumption of no work disability as quoted above is applicable during that period respondent returned claimant back to work and provided accommodated employment. The Appeals Board agrees with the Administrative Law Judge that respondent provided accommodated employment through September 12, 1994, the date claimant was notified to pick up her toolbox.

The Appeals Board also agrees with the Administrative Law Judge that a presumption of no work disability was no longer applicable for the period following September 12, 1994, when it became apparent respondent no longer offered claimant an accommodated job. Therefore, the Administrative Law Judge was correct in awarding claimant a work disability for that period.

Based upon K.S.A. 1991 Supp. 44-510e, the Administrative Law Judge found that claimant had a 50 percent work disability. The Appeals Board agrees with that conclusion and finds no reason to disturb that finding. Both Dr. Lawrence R. Blaty and Dr. Paul Lesko indicated that claimant should follow weight limitations in the range of 25 to 30 pounds and restrictions against repetitive gripping, squeezing, twisting, turning, flexion and extension activities with either wrist, and avoid power tools. Based upon claimant's restrictions, vocational rehabilitation expert James Molski testified claimant had a 55 to 70 percent loss of ability to perform work in the open labor market and a 52 to 59 percent loss of ability to earn a comparable wage. Respondent's vocational rehabilitation expert Karen Terrill indicated claimant had a 58 percent loss of ability to perform work in the open labor market and a 31 percent loss of ability to earn a comparable wage considering those same restrictions. The Administrative Law Judge considered those percentages and found claimant had a 59 percent loss of ability to perform work in the open labor market and a 41 percent loss of ability to earn a comparable wage which resulted in a 50 percent work disability. The Appeals Board agrees with claimant's request to affirm the Award in all respects and, therefore, finds the Administrative Law Judge's work disability analysis is reasonable and correct, and adopts it as its own.

The Appeals Board hereby adopts the findings and conclusions of the Administrative Law Judge to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated January 19, 1995, and the Award Nunc Pro Tunc dated January 20, 1995, entered by Administrative Law Judge Shannon S. Krysl should be, and hereby are, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Wichita, KS
Eric K. Kuhn, Wichita, KS
Randall C. Henry, Hutchinson, KS
Administrative Law Judge, Wichita, KS
Philip S. Harness, Director